IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-6608

* * *

JAMES DEMOUCHETTE,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

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On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent in the above entitled and numbered cause, and by and through its attorney of record, the Attorney General of Texas, Mark White, files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Demouchette v. State, 591 S.W.2d 488 (Tex. Crim.App. 1979).

JURISDICTION

Petitioner is seeking to invoke the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the Texas Death Penalty Statute is unconstitutional pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that the State has failed to establish any criteria for the imposition of death sentences.

II. Whether the presentation of psychiatric testimony in the punishment phase of Petitioner's trial without the State notifying Petitioner's attorney of their intent to introduce psychiatric testimony denied Petitioner due process.

III. Whether Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated by the State's use of psychiatric testimony without advising Petitioner of his right to remain silent and his right counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. UNITED STATES CONST., AMEND. V.
2. UNITED STATES CONST., AMEND. VI.
3. UNITED STATES CONST., AMEND. VIII.
4. UNITED STATES CONST., AMEND. XIV.

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Harris County, Texas, for the offense of murder of Scott K. Sorrells, during the course of committing robbery on or about October 18, 1976. Petitioner was appointed counsel to represent him. A psychiatric examination was performed on Petitioner. Jury selection began, after denial of a Motion for Change of Venue, on July 6, 1977. On July 18, 1977, Petitioner entered a plea of not guilty to the indictment and testimony began. On July 20, 1977, Petitioner was found guilty by the jury of capital murder as charged in the indictment. That afternoon the punishment phase of the trial began. Late that afternoon, the jury returned a verdict of yes to Special Issue No. 1 and Special Issue No. 2 which resulted in a sentence of death. Petitioner appealed his conviction to the Texas Court of Criminal Appeals where it was affirmed in a unanimous decision on November 7, 1979. Motion for Leave to File Petitioner's Motion for Rehearing was denied on December 19, 1979. It is from that opinion that this petition for writ of certiorari is taken.

The evidence presented at Petitioner's trial showed that Petitioner and his brother, Chris Demouchette, entered a Pizza

Hut Restaurant in Houston, Texas, on October 18, 1976. After placing an order, they sat down in a rear booth. Shortly thereafter, the deceased, Scott Sorrells, and his roommate, Robert White, who was also murdered, entered the Pizza Hut. Scott was an employee there and was to have met the manager, Jeoffrey Hambrick, in order to learn bookkeeping. Hambrick, Sorrells and White sat down together in the front of the restaurant. Petitioner and his brother joined the other three; then Petitioner pulled a gun on Robert White and shot him in the face. Petitioner next shot Hambrick and Sorrells in the head. Sorrells and Hambrick were still alive. Petitioner and his brother returned to the table after rummaging around in the rear of the restaurant and shot Sorrells a second time. Hambrick then heard the click of a gun as it misfired. The keys were removed from Hambrick's pocket and the two Demouchette brothers left the store. Hambrick called the police, who found Scott dead and White and Hambrick wounded. White died shortly after reaching the hospital. Money and a stereo receiver had been taken from the Pizza Hut. Hambrick identified the two Demouchette brothers as the perpetrators of the crime and identified Petitioner as the trigger man. Petitioner was also identified by Billy Harper, who had been a customer in the Pizza Hut shortly before the shooting. No defensive evidence was presented. At the punishment stage of the trial, evidence was introduced as to Petitioner's two prior felony convictions, his bad reputation in the community, and hypothetical testimony from a psychologist as to the characteristics of a psychopathic personality.

ARGUMENT AND AUTHORITIES

I.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT A DEATH SENTENCE SHOULD BE IMPOSED.

Petitioner has alleged in his application for writ of certiorari that the Texas Capital Murder Statute is unconstitutional in that it has failed to establish any criteria for the imposition of death sentences in order to assist juries

in the determination of the special issues. This issue was not presented to the Texas Court of Criminal Appeals on direct appeal. Therefore, it cannot be considered now. Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). However, a similar issue as to insufficiency of the evidence to support the jury's finding was presented. In evaluating Petitioner's case, the Texas court found that the evidence showed beyond a reasonable doubt that Petitioner and his brother committed a brutal robbery-murder in which two people were murdered and a third seriously injured. The crime was committed in a cold and calculating manner. The State introduced evidence of two prior felony convictions, one for theft and one for burglary. The State also presented testimony of John Womack, Assistant Warden at the Clemons Unit of the Texas Department of Corrections, Howard Mitchell, Assistant Warden at the Darrington Unit of the Texas Department of Corrections, Paul Jacka, Warden of the Jester Unit of the Texas Department of Corrections, and Robert Killbuck, Senior Lieutenant of the Harris County Sheriff's Department, who all testified that Petitioner's reputation for being a peaceful and law-abiding citizen in the community was bad.

The court went on to determine that the calculated nature of the acts were probative evidence of the propensity to commit future acts of violence. In making this determination, the court cited cases in which the court had upheld the death sentence and contrasted a case in which the court had reversed the death sentence for insufficient evidence to prove that element. The court also found there was no evidence to show that Petitioner was under the influence or domination of anyone else. The court made a careful assessment of the evidence in Petitioner's case and found it sufficient to support the jury's verdict.

II.

THE PRESENTATION OF PSYCHIATRIC TESTIMONY ON HYPOTHETICAL QUESTIONS IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

Petitioner, in his Petition for Certiorari, asks this Court to consider the use of psychiatric testimony during

the punishment phase of his trial. This question is not properly before this Court for review on petition for writ of certiorari. No question was ever raised in the Texas Court of Criminal Appeals concerning the use of the psychiatric testimony during Petitioner's trial. Petitioner's attorney states that he is going to file an out-of-time Motion for Rehearing in the Texas Court of Criminal Appeals. There is no Texas procedure to provide for this. Further, the Texas Court of Criminal Appeals will not consider any pleading even if there was a procedure to provide for such pleading, while a case is being considered by this Court. Houston Chronicle Publishing Co. v. McMaster, ___ S.W.2d ___ (Tex.Crim.App. No. 64,751 delivered May 14, 1980); see also Harris County Commissioner's Court v. Moore, 420 U.S. 77 (1975); Palmer v. Jackson, ___ F.2d ___ (5th Cir. No. 78-2716, delivered May 19, 1980).

Further, no objection was made at trial on the grounds now brought forward. Absent a correct contemporaneous objection, there is nothing presented for review. Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977); Wainwright v. Sykes, 433 U.S. 72 (1977).

Petitioner's allegations in regard to the psychiatric testimony are inapposite to the facts in Estelle v. Smith, No. 79-1127, cert. granted March 17, 1980. In Petitioner's case, his attorney was well aware of the examinations by the psychiatrist and the psychologist at the Harris County Forensic Psychiatry Unit. Petitioner's counsel signed the Motion for Psychiatric Examination. The psychologist who testified at Petitioner's trial, Jerome Brown, testified that he made an examination of the Petitioner. (S/F 1737). An objection was sustained when the State asked the psychologist for his evaluation of Petitioner's personality. (S/F 1738). The psychologist then testified as to the general characteristics of a psychopathic personality. (S/F 1739). The witness was next asked a hypothetical question

and stated that in his opinion, a person such as the one described in the hypothetical situation, would probably commit future acts of violence. (S/F 1741). The witness never testified as to the evaluation performed on James Demouchette or as to whether he believed that James Demouchette himself would commit future acts of criminal violence.

Since Petitioner has never presented these allegations to the Texas Court of Criminal Appeals, certiorari is improper as to questions II and III. There is no evidence in the record to support Petitioner's allegations as to the manner in which the testimony was used. Further, since the witness testified only as to hypothetical situations, not as to an evaluation on Petitioner, the testimony is completely dissimilar to the testimony in Estelle v. Smith, supra, and would not be affected by this Court's opinion in Estelle v. Smith.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that certiorari be denied.

Respectfully submitted,

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